**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: March 15, 1988
CASE NO. 87-INA-562

IN THE MATTER OF

EDELWEISS MANUFACTURING COMPANY, INC.,

Employer

on behalf of

FRANCESCO APPOLLONIA

Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Fath, Levin, and Tureck, Administrative Law Judges

## DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

## Statement of the Case

Edelweiss Manufacturing Co., Inc. is a small company in North Carolina in the business of textile manufacturing of hosiery goods. It is a highly computerized operation, which is unique for a business of this size. As an adjunct to its product, it does in-house designing and manufacturing of machinery to perform the work. Edelweiss employs sixteen persons including the alien and his wife.

The company was founded by the alien in October, 1982. The following month, it was incorporated under the laws of North Carolina. The alien was then and he is now the owner of 100 percent of the stock of the corporation. He is the chief executive officer of the corporation, and he is the chief and sole manager of the business.

Edelweiss applied for a labor certification on behalf of the alien to fill a job as plant manager of the business: "Directs and coordinates activities concerned with production of company's textile hosiery products". AF 21 and 22. The qualifications stated in the company's advertisement were detailed and technical, and in part included:

> Have 4 years vocational/technical school with concentration in mechanical engineering and textile machinery required.
>
> Have 5 years experience in job offered required.
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> Must have at least 5 years hands-on experience and/or combination with formal education in the conversion and installation of necessary parts to complete conversion process within certain cost limitations.
>
> Must have working knowledge with computer operation and maintenance of Sangiacoma 4 CUS computer machines including designing asnd making fashionable samples.

The alien's early education and all of his work experience are in the textile industry. He completed four years of vocational/technical school with concentration in mechanical engineering and textile machinery. AF 23. His first job was in the family hosiery business. Thereafter, with a number of employers, he broadened his capabilities to include the design and maintenance of production equipment. The alien has been working in the United States on a treaty investors' visa (E-2) since 1981.

The employer's advertisement brought applications and resumes from seven persons, all of whom had extensive qualifications. Most had professional degrees and manufacturing plant experience, but none had the exact vocational/technical school training, or the hosiery

manufacturing experience required by the employer. All of the applicants were rejected by the employer for lack of hosiery manufacturing experience. File at 27.

Notice of Findings

In his Notice of Findings, the Certifying Officer instructed the employer in the requirements of the regulations for obtaining the prevailing wage, advertising the position, and the handling of applications. Moreover, the employer was directed to provide information relative to the ownership of the corporation, and the alien's connection with the company. The employer complied, and is not faulted for failing to follow the recruiting format provided in the regulations.

After an evaluation of the employer's rebuttal, the Certifying Officer issued a Final Determination denying the labor certification:

> The alien is sole owner of this corporation. He owns and holds all issued and outstanding shares of the corporation. As a result he has control over who is on the board of directors and the actions and decisions of the board of directors. This is clearly outlined in the corporation bylaws. Simply stated, the alien with his 100 ownership, has control over all aspects of the corporation to include hiring and firing of staff personnel.
>
> Section 656.50, states that employment is defined as meaning permanent full-time work by an employee for an employer other than oneself. Therefore, since the alien owns all shares and control of the corporation, a staff position for the same alien in the corporation does not meet the definition of employment as required by the labor certification regulations.
>
> As there is no employer/employee relationship, this case is denied.

The employer appealed the denial of the Certifying Officer. The brief on appeal dealt with whether the Certifying Officer erred in finding that there was no employer/employee relationship between the employer and the alien. The question the employer puts to the Board: "[W]hether this employer can have a bonafide [sic] job opening for U.S. workers when it's solely owned by the Alien." Employer's brief at 5. The employer argues that the corporation is an entity separate from its stockholders, and that it can hire aliens and petition on their behalf for labor certification.

In a brief in support of the Certifying Officer, the Solicitor of Labor agrees that the corporation is a separate legal entity, and he does not contend that a bona fide job opportunity cannot exist where an alien has some corporate interest or ownership in the company seeking labor certification. The question as seen by the Solicitor is whether a bona fide job offer exists in this case for a U.S. worker rather than whether an employer/employee relationship can exist between sole stockholder and a corporation.

The employer filed a supplemental brief in which it argues that the alien and the corporation are not the same entity, and that a labor certification must be granted unless it is clear that the corporation is a sham to avoid the law and regulations on labor certification.

Discussion

The denial of labor certification in this case has been construed as an attack on the corporate form of doing business. It is argued that the corporation and the stockholders are separate and distinct entities, which are beyond scrutiny save in cases of fraud. In the context of this case, this view suggests that the representations of the corporation must be taken at face value without question of the real motive, or purpose of the stockholders in directing the corporate acts. Applied to this case, it means (and it has been stated) that the Secretary of Labor must accept the representations of the employer that it is offering a job to a U.S. worker unless the corporate action is clearly a sham to avoid the effects of the Act and regulations.

In matters affecting the public interest, we are not bound to find fraud or sham in order to look behind the corporation to determine the validity of its actions. Public interest and policy considerations override the immunity given the stockholders under the corporate entity. For example, the corporate form does not shield the stockholders from the operation of the public interest in matters of taxation, labor law, or antitrust actions. As regards the public interest, the guiding principle is succinctly stated in Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co.:

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . [citations omitted]. In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.

417 U. S. 703, 94 S. Ct. 2578 (1974). Labor certification is a matter of important public concern, which requires attention to substance rather than form.

Edelweiss is the alter ego of the alien. He is the sole stockholder, chief executive officer, and general manager of operations. The decisions on hiring and firing are in his hands. The qualifications for the job are a remarkable match with the alien's training and experience, and tend to restrict applicants to the alien alone. Failure to meet the qualifications for the job was the reason given for rejecting seven highly qualified U. S. workers. These considerations belie Edelweiss's representations that it is offering a job to a U.S. worker. In the Matter of Amger Corporation, 87-INA-545 (October 15, 1987).

The Certifying Officer's final determination is correct: the job is not ""permanent full-time work by an employee for an employer other than himself" and, therefore, does not constitute "employment" as defined at 20 C.F.R. §656.50; and there is no employer/employee relationship.

## ORDER

It is ADJUDGED and ORDERED that the decision of the Certifying Officer denying a labor certification to Edelweiss be, and is hereby, affirmed.

GEORGE A. FATH
Administrative Law Judge